LOKE SOW LENG

v.

YAP ENG KEE

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[DIVORCE PETITION NO: S4-33-260-2001]
14 JANUARY 2004

FAMILY LAW: *Children - Custody - Children aged 14 and 9 years - Mother proved to be emotionally unstable - Whether father more entitled to custody - Maintenance - Quantum, adequacy of - Mother gainfully employed - Whether equally obliged to maintain - Law Reform (Marriage and Divorce) Act 1976, ss. 53, 54, 92*

FAMILY LAW: *Matrimonial property - Division of property - Asset acquired through sole effort of husband/wife - Apportionment as between acquirer and non-acquirer - Law Reform (Marriage and Divorce) Act 1976, s. 76*

The petitioner wife, who had been living separately from the respondent husband since April 1999, had applied for an order that: (i) she be given custody of two of their three children, aged 14 and 9 respectively; (ii) she was entitled to a half share of the matrimonial assets acquired by the respondent, namely a house worth RM547,726 ('No. 10') and a car worth RM3,500 ('the Car'); and (iii) the interim maintenance order be varied and increased from RM1,000 to RM3,500 per month. It was not in dispute that the younger child was at the material time living with the petitioner, while the older one was with the respondent. It was also not in dispute that the aforesaid assets apart, the petitioner had also bought, with her own moneys, a condominium unit worth RM60,000 ('the Condo'). The respondent contested the petition arguing, in essence, that the petitioner was emotionally unstable and was unable to take proper care of the children. Before the learned judge, evidence was led which showed that the petitioner: (i) was having a hectic lifestyle and had little time for the children; (ii) had previously attempted suicide; (iii) had walked out of the matrimonial home after the first and the third child were born, and again after the purchase of No. 10; and (iv) had once threatened to kill the children. The affidavit evidence further revealed that the respondent had taken good care of the second child and was enjoying the flexibility of time to spend with the children. The issues that arose were: (i) whether the court, on the facts

and in the circumstances, could grant custody of the two children to the respondent; and (ii) whether the petitioner was entitled to a share of the assets so acquired and paid for by the respondent.

Held (dismissing the petition in the main):

[1] The children's welfare would be better preserved if they were put under the care of the respondent. Obviously, the temperamental, emotional behaviour displayed by the petitioner would be detrimental to the children's well-being. In the circumstances, the court would grant custody of the children to the respondent. The children's relationship with their mother, however, would continue to be secured by granting sufficient access to her. (pp 217 g-h & 218 a)

[2] There was no basis for maintenance to commence from 1 April 1999 or for the interim maintenance order to be varied. The respondent had left Kuala Lumpur to work in Kuching on 1 April 1999 as he could not find work in Kuala Lumpur. The respondent had also been regularly paying the sum of RM1,000 per month since 25 February 2002. The facts also showed that the respondent was no longer in full employment since he returned to Kuala Lumpur in 2003, and so, by virtue of s. 92 Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the petitioner, who has been working, would be equally obliged to maintain the children. In any case, the maintenance of RM1,000 per month could not be said to be unreasonable. (pp 218 g & 219 a-e)

[3] The petitioner and the respondent had led independent lives through their marriage and the arrangement had suited them as they were both working. On the basis of the arrangement and lifestyle that they were accustomed to, the petitioner, who is still working, has no merit to claim RM500 per month for her maintenance. (p 219 g-h)

[4] No. 10 and the Car were assets that had been solely acquired by the respondent, just as the Condo was acquired through the sole effort of the petitioner. In the event, s. 76(4) of the Act was relevant. Accordingly, the respondent ought to receive a greater proportion from the proceeds of the sale of No. 10 and the Car than the petitioner, and the petitioner, likewise, should receive a greater proportion for the Condo than the respondent. Bearing in mind the authorities, and the fact that the 14-year-old had been living with the respondent since 1999 and continued to desire to live with her father, an award of 10% to the non-acquirer would be reasonable and fair. (pp 221 e-g, 222 c-e & 225 a-b)

[4a] On the basis of 90:10, the petitioner's 10% would give her RM55,122.62 from the proceeds of No. 10 and the Car. On the same ratio, the respondent would get RM6,000 from the value of the condo. The total value to be given to the petitioner was thus RM49,122.62. The wife would therefore keep the condo and have a further sum of RM49,122.62. (p 225 e)

[Order accordingly.]

Case(s) referred to:
Chong Siew Lee v. Lau Mun Chong [1994] 4 MLJ 559 HC ***(refd)***
Diana Clarice Chan Ching Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
Lee Soh Choo v. Tan Ket Huat [1986] 2 CLJ 143 HC ***(refd)***
Lim Bee Cheng v. Christopher Lee Joo Peng [1996] 2 CLJ 697 HC ***(foll)***
Ng Hwee Keng v. Chia Soon Hin William [1995] 2 SLR 231 ***(foll)***
Re Heng Peng Hoo & Anor [1989] 3 MLJ 103 HC ***(foll)***
Tan Hiew Kang v. Poh Siew Hah Katherine (Divorce Petition No 627 of 1987 High Court Singapore) (Unreported) ***(refd)***
Tan Siew Kee v. Chua Ah Boey [1988] 3 MLJ 20 HC ***(refd)***
Thavamani Deve Govindasamy v. N Sugumaran Neelmehan & Anor [1996] 4 MLJ 195 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (2), (3), (4), 92

For the petitioner wife - CY Chong; M/s CY Chong & Assocs
For the respondent husband - Rita Phuah; M/s Lai, Yoong & Rita

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:
The petitioner wife married the respondent husband on 5 March 1983 at Ibu Pejabat, Jabatan Pendaftaran Negara Malaysia, Petaling Jaya, Selangor. There are three children of the marriage, Derek Yap Yong Jin (L) 19, Sharon Yap Shu Wen (P) 14 and James Yap Han Yung (L) 9. It is noted that there is an arrangement of a split custody of the children since the end of 1999 whereby the 2nd child had lived with the respondent husband in Kuching and the 1st and 3rd child with the petitioner wife in Kuala Lumpur. Since the beginning of 2003 the respondent husband and the 2nd child have returned to live in Seremban. At this juncture this court is only concerned with the custody of the 2nd and 3rd child as the 1st child is above 18 years old and no longer lives with either parent. The 2nd child is 14 years old and the 3rd child is nine years old. The general tendency has been to favour mothers where

custody of children is concerned. However the present social trends have seen many mothers opting to devote more time to their careers. In this instance the children are all above the age of seven. Accordingly the presumption of law has no application herein. Both parents therefore stand in an equal footing in consideration of the custody of the children.

In *Lee Soh Choo v. Tan Ket Huat* [1986] 2 CLJ 143, Siti Norma J (as she then was) dismissed the application of the applicant wife because she could not show that she will be able to devote her full attention to the children.

In *Tan Siew Kee v. Chua Ah Boey* [1988] 3 MLJ 20, the facts show that on the father's side there was little doubt that he loves his son and that he can provide a stable home. The matrimonial history of the defendant shows that she was more concerned with her own welfare than that of her children.

In *Chong Siew Lee v. Lau Mun Chong* [1994] 4 MLJ 559, the High Court at Kuala Lumpur considered the factors of a loving parent with a stable home as conclusive to the attainment of such well being and granted custody of the child to the father.

In *Thavamani Deve Govindasamy v. N Sugumaran Neelmehan & Anor* [1996] 4 MLJ 195, the High Court of Shah Alam held that the onus is on the applicant (wife) to offer such a significant improvement or advantages to the welfare of the child to warrant a change of custody.

In the present case the consideration to be given is the welfare of the children. The factors in favour of granting the respondent husband the custody are as follows:

(a) lives in Seremban and as a part time consultant enjoys the flexibility of time to give to the two children;

(b) undemanding lifestyle in Seremban allows him to send the children and pick them from school;

(c) track record in the last three years that he is able to care for the 2nd child who has performed well in her studies in Kuching and has also grown to be a mature teenager, and

(d) care and provided for the children throughout their tender years despite having to deal with the petitioner wife's temperament.

The supporting affidavits filed in the interim application have revealed that the parties have gone through a highly emotional lifestyle. The fights and disagreements are no longer relevant as the divorce is now no longer in dispute. Further considerations on the making of the custody order are as follows:

(a) The petitioner wife had previously attempted suicide;

(b) The petitioner wife had walked out of the house when Derek was only a baby;

(c) The petitioner wife had dragged the members of the family and baby to the police station until 2.30am;

(d) The petitioner wife had locked herself in the bathroom with Derek and Sharon and threatened to kill them;

(e) The petitioner wife had dragged Derek into the bathroom with a chopper;

(f) The petitioner wife had left the family again shortly after the house at Kampung Tunku was purchased by complaining that she could not stand the grime and dust;

(g) In 1994 the petitioner wife once again left the family just one month after James was born;

(h) over a period beginning April 1999 the petitioner wife had placed Derek with her relative;

(i) James has been left in the constant care of a babysister;

(j) The petitioner wife undergoes a demanding and hectic lifestyle that leaves her little time to spend with the children.

As pleaded in the petition the allegations made against the respondent husband are directed *vis-a-vis* her relationship towards the respondent husband as a husband. The respondent husband's ability to care and father the children have not been challenged whatsoever. The children's welfare will be better preserved if they are being cared for by the respondent husband. The temperamental emotional behaviour that the petitioner wife displays is detrimental to the children's well being. I think it is never easy for a father to raise the children on his own yet the respondent husband is determined to do so in this instance as he fully is aware that the petitioner wife does not have the time nor the emotional mantle to look after the well-being of the children. I am of the opinion that the court can grant custody of the children to the respondent

husband and the children's relationship with their mother continues to be secured by granting sufficient access to the petitioner wife particularly during hours when the petitioner wife has the time to devote to the children. I think to grant custody of the children to the petitioner wife will result in the children being placed in the care of a babysitter instead. At the same time the parties will have to expend unnecessary costs for the services of the babysitter when the said expenses can be allocated for the children's immediate needs.

By reason that the existing custody arrangement have been going on since 1999 namely Sharon living with the respondent husband and James with the petitioner wife this court has also to consider whether to continue with the *status quo* or to grant one parent the custody of both the 2nd and 3rd child. Obviously the arrangement of a split custody is not desirable but the children may have come to terms with the existing arrangements and to remove them from their present arrangements may also create negative effects on them. In *Diana Clarice Chan Ching Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721 the Court of Appeal had recognised the possible negative effects on the children to move them from their existing arrangements which had been going on for the last 15 months and accordingly ordered that the interim arrangement of the split custody was to continue until disposal of the rehearing.

In the petition the petitioner wife has claimed for the following maintenance namely:

(a) RM2,000 in respect of the 1st and 3rd child as from 1 April 1999;

(b) RM1,000 in respect of the 2nd child in the event that the petitioner wife obtains custody of the said child and

(c) RM500 for herself as from 1 April 1999.

I think in the present case there is no basis as for the maintenance to commence as from 1 April 1999. The respondent husband had left Kuala Lumpur to work in Kuching on 1 April 1999 as he was unable to secure employment in Kuala Lumpur for over one year. Despite being unemployed the respondent husband still provided for the family from whatever savings and borrowings that he had received.

Thereafter the respondent husband had continued to provide for the family while he was working in Kuching. With effect from end of 1999 when the respondent husband brought the 2nd and 3rd child to Kuching the respondent husband has been paying a sum of RM400 a month towards the 1st child. The arrangement continued until 25 February 2002 when upon the application of the petitioner wife for maintenance of RM2,910, the High Court made an order that the

interim maintenance towards the 1st and 3rd child to be at RM1,000 per month. The respondent husband has been regularly paying the sum of RM1,000 per month since 25 February 2002. Thus any variation to be made to the existing maintenance order can only take current effect and not retrospective in the light of the due compliance of the existing court order by the respondent husband. The petitioner wife had prayed for the sum of RM2,910 per month for both 1st and 3rd child but the court had only ordered RM1,000 per month for both the children. As from the date of the said application there is no further evidence to show that the maintenance should be increased.

The respondent husband is no longer in full employment since he returned to Kuala Lumpur in the beginning of 2003. The petitioner wife who is working is equally obliged to maintain the children. I refer to s. 92 of the Law Reform (Marriage & Divorce) Act 1976 (the Act) which provides:

> Except where an agreement or order of court otherwise provides it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children whether they are in his or her custody or the ... .

The maintenance of RM1,000 per month made was not unreasonable as the petitioner wife as a working parent is also legally obliged to maintain the 2nd child who has been in his custody since end of 1999. In *Tan Hiew Kang v. Poh Siew Hah Katherine Divorce* Petition No. 627 of 1987 High Court Singapore, where it was held:

> s. 21 of the Women's Charter make it clear that the duty to maintain children is not the exclusive prerogative of the father of the child. Upon dissolution of the marriage, the husband does not become a worker bee and the wife a queen bee ... .

The petitioner wife and respondent husband have led independent lives through their marriage in that they have not pooled their income together and neither have the respondent husband received any monthly payment from the petitioner wife. The arrangement had suited the parties as they were both working at all material times. On the basis of the arrangement and lifestyle that they were accustomed to the petitioner wife who is still working has no merit to claim the maintenance of RM500 per month from the respondent husband. The petitioner wife has not provided any evidence to support her claim for the maintenance for herself. The allegation that the respondent husband earned a salary of RM8,000 per month is no longer relevant since the respondent husband has ceased working in Kuching. The respondent husband is no longer in full time employment since beginning of 2003.

Matrimonial assets of the parties are namely:

(i) Proceeds of sale from No. 10, Lorong Kampung Tunku ("No. 10");

(ii) Proceeds of sale from vehicle ("Car")

(iii) Condominium at Bukit OUG ("Condo")

No. 10 and the Car were registered in the name of the respondent husband while the Condo is registered in the name of the petitioner wife. In the divorce petition filed by the petioner/wife she has claimed for 1/2 share of the proceeds of sale from No. 10 and of the Car. The respondent husband has also claimed for division under s. 76 of the Act in respect of the Condo registered in the petitioner wife's name. The first issue to be decided in respect of the division of the matrimonial assets under s. 76 of Act 164 is whether:

(a) No. 10, the Car and the Condo were assets jointly acquired by the parties during their marriage (see s. 76(1) and (2) of Act 164); or

(b) Whether No.10, the Car and the Condo were assets solely acquired by the parties during their marriage (see s. 76(3) and (4) of Act 164).

I am fortified in my opinion by reference to *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697 where the Court held:

> When dealing with an application under section 76 of the Act it is essential for this court to make a finding of fact on the question of whether the said property was acquired by the Wife and the Husband during the marriage by their joint efforts and if so to apply section 76(1) and (2); or whether the said property was acquired by the Husband during the marriage by his sole effort and if so to apply section 76(3) and (4) of the Act.

In the oral evidence adduced by the parties the following facts are noted, namely:

No. 10

(a) The respondent husband paid for the entire purchase price of No. 10;

(b) The respondent husband paid for all the monthly loan repayments firstly from Nova Scotia Bank and thereafter from AIA;

(c) No. 10 was at all material times registered in the name of the respondent husband alone and

(d) The legal fees and estate agent's commission were also paid by the respondent husband only.

Car

(a) The entire purchase price was also fully paid by the respondent husband.

Condo

(a) The down payment was paid by the petitioner wife's godmother/babysitter and

(b) The monthly repayments were paid by the petitioner

Wife.

Pursuant to s. 76(2) of Act 164 which provides:

In exercising the power conferred by sub-s. (1) the court shall have regard to:

(a) the extent of the contributions made by each party in money, property or work towards acquiring the assets;

(b) any debts owing by either party which were contracted for their benefit;

(c) the needs of the minor children, if any of the marriage.

It is clear that the extent of contributions under s. 76(2) only considers money, property or work towards acquiring. It has not been disputed that the respondent husband was the only party who has contributed money's worth towards the acquisition of No. 10 and the car. Therefore No. 10 and the car are assets that have been solely acquired by the respondent husband. This is admitted by the petitioner's counsel at p. 6 of his supplementary written submission dated 22 December 2003, where he has submitted:

... biarpun No. 10 itu telah diperolehi dengan usaha tunggal Respondent, namun

In the case of the condo, I think from the evidence the petitioner/wife appears to be the sole financial contributor towards the acquisition of the condo.

In the case of assets acquired by the sole efforts of the party, the consideration pursuant to s. 76(4) of Act 164 becomes relevant, namely:

In exercising the power conferred by sub-s. (3) the court shall have regard to:

(a) The extent of the contributions made by the other party who did not acquire the assets to the welfare of the family looking after the home and caring for the family;

(b) The need of the minor children, if any of the marriage, and subject to those considerations the court may divide the assets or the proceeds of sale in such proportions as the court thinks is reasonable but in any case the party whose effort the assets were acquired shall receive a greater proportion.

In *Lim Beng Cheng*'s case the judge held:

> Strictly in accordance with the requirements under s. 76(4) it would follow that the Husband should receive a greater proportion of the share or proceeds of the sale and upon the facts of the current case I would hold that the Wife share of the proceeds be limited to no more than 1/3.

In considering the proportion to be awarded to the petitioner wife in respect of the proceeds of sale from No. 10 and the car and the proportion of the condo to be awarded to the respondent husband the caveat set out in s. 76(4) of the Act is relevant, namely that the party whose effort the assets were acquired shall receive a greater proportion. Accordingly the respondent husband ought to receive a greater proportion from the proceeds of sale from No. 10 and the car than the petitioner and the petitioner wife should also receive a greater proportion of the condo than the husband. In the assessment as to the proportion to award the factors set out in s. 76(3) becomes relevant, namely the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family in looking after the home and caring for the family. From the oral evidence of the petitioner wife we have the following namely:

(a) The petitioner wife and respondent husband had three children in the marriage of ages 19, 14 and 9 years old;

(b) The petitioner wife was working throughout her marriage;

(c) The family had employed a maid until 1998;

(d) In 1998 the petitioner had to take the youngest child with her when she went to work;

(e) That she bought food for the family from the market while the respondent paid for things bought from supermarket;

(f) That she bought for some household furnishings but those that were bought by her were taken with her when she moved to her condo;

(g) The parties have been living apart since April 1999;

(h) The eldest child is already above 18 years old;

(i) The youngest child who is nine years old has been with the petitioner wife since January 2000, and

(j) The second child who is 14 years has been with the respondent since December 1999.

The respondent husband's evidence primarily from his affidavits were as follows:

(a) That the petitioner wife had walked out of the family shortly after the eldest child was born and again when the youngest child was born;

(b) On the occasion when she had done so the respondent husband had to take leave or sought help from his mother and brother;

(c) The petitioner wife had deeply indulged herself into working long hours and the children were cared for by the maid and/or the respondent husband;

(d) The maid did the marketing and shopping;

(e) During the time they were living together the respondent husband took care of the children's school affairs, and

(f) The respondent husband had been looking after the daughter since 1999.

There is a dispute as how much the petitioner wife has contributed towards looking after the home and caring for the family. In the light of such dispute I am guided by the following case law.

In *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103, the wife applied for half share of the matrimonial home registered in the name of the husband. The wife owns her home and has her own hair salon with an income of RM1,000 a month. The husband was given the custody of the four children and therefore required to continue to live in the home. The court held:

> The Court held that it was not joint property and application under section 76(1) of the Act failed. However that as the wife had made contributions by rendering domestic services to the husband and towards the welfare of the family and by looking after the four children and bringing them up the wife was awarded RM1,000.

In *Lim Bee Cheng v. Christopher Lee Joo Peng* [1996] 2 CLJ 697, the husband purchased the house and placed the wife's name as co-owner. The Husband paid the down payment and also took a loan where he settled the monthly repayments. The husband also paid for the legal fees, assessments

and improvements. The wife paid for some quit rent and assessments and after the *decree nisi* paid the redemption sum of the property. The wife claimed she paid some ten monthly payments although the receipts were issued in husband's name but the receipts were in her possession. The wife claimed that she reimbursed her husband for the payments made by him but which was refuted and denied by the husband. The judge in considering the dearth of evidence on any tangible contribution by her towards the acquisition of the said property and her admission that save for the said ten installments, quit rents and redemption sum paid by her she had made no other financial contribution on the acquired during the marriage not by the joint efforts of the parties but by the sole effort of the husband. Having found that the said property was acquired by the sole effort of the husband the court then considered s. 76(4) namely that it is mandatory that the court shall give the acquired a greater proportion of the property. The only factors which the court also had to consider was s. 76(4)a:

> The extent of contributions made by the party who did not acquire assets to the welfare of the family by looking after the home or caring for the family ... .

In *Ng Hwee Keng v. Chia Soon Hin William* [1995] 2 SLR 231, the marriage lasted some 19 years where at time of divorce the adopted son was already 12 years old. Court of Appeal decided that the task is first to ascertain where an asset is acquired during marriage whether it is by joint efforts of the parties to the marriage or by the sole effort of one party. In that case the Eunos flat was found to be acquired by joint efforts, the husband was found to have contributed 80% and the wife slightly less than 20%. The court also took into consideration the non financial contribution and awarded the wife 40% of the proceeds. In respect of the other assets which were solely acquired by the husband the Court of Appeal took into consideration the 19 years of marriage, 12 year old son, and the fact that the wife's contribution towards the welfare of the family by looking after the home and caring for the family. There was evidence both in the affidavit and *viva voce*. The wife was awarded 20% of the value of those assets.

In the present case it is relevant herein to bear in mind s. 76(4) namely that the party who has acquired the asset should have a greater proportion. Furthermore the authorities cited above show that the Malaysian courts have awarded between a nominal sum of RM10,000 and 30% to the non-acquirer. Then at the Court of Appeal in Singapore 80% was awarded to the acquirer and 20% to the other non-acquirer. Taking those authorities and provision into consideration the petitioner wife has no merit to claim for 1/2 of the proceeds of sale from No. 10 nor the car. At law her claim cannot be more than or

equal to what the respondent will have. In fact the authorities have indicated a range from nominal to no more than 30%. Bearing in mind evidence in this proceedings in particular that there are two children age 14 years and 9 years and of whom the 14 year has been living with the respondent husband since 1999 and continue to desire to live with her father and the considerations made in the authorities cited, I come to the conclusion that an award of 10% to the non-acquirer is reasonable and fair. Therefore the breakdown of the value of the matrimonial assets are as follows:

Husband:	Acquirer and Wife:	Non-Acquirer
No.10	RM547,726.23	
Car	3,500	
Total	RM551,116.23	

Wife: Acquirer and Husband: Non-Acquirer

Condo less redemption RM60,000

I therefore so order in the present case that on the basis of 90:10, the wife's 10% will give her RM55,122.62 from proceeds of No. 10 and the car. On the same ratio of 90:10 the husband will have RM6,000 from the value of the condo. The total value to be given to the wife will be RM49,122.62. The wife will therefore keep her condo and have a further sum of RM49,122.62.